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IN THE

Supreme Court of the United States

October Term, 1978

No. 8, Original

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Intervenors,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

Response of the States of Arizona, California, and Nevada and the Other California Defendants to the Motion of the United States for Modification of Decree.

(See List of Attorneys on next page)

February 14, 1979

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

For the State of Arizona
RALPH E. HUNSAKER
Chief Counsel
Arizona Water Commission
222 North Central Avenue
Suite 800
Phoenix, Arizona 85004
(602) 263-3888

For the State of California
GEORGE DEUKMEJIAN
Attorney General
3580 Wilshire Boulevard
Los Angeles, California 90010
SANFORD N. GRUSKIN
Chief Assistant Attorney General
R. H. CONNETT
N. GREGORY TAYLOR
Assistant Attorneys General
DOUGLAS B. NOBLE
EMIL STIPANOVICH, JR.
ANITA E. RUUD
Deputy Attorneys General
3580 Wilshire Boulevard
Los Angeles, California 90010
(213) 736-2132,

For Palo Verde Irrigation District
ROY H. MANN
Counsel
CLAYSON, ROTHROCK & MANN
601 South Main Street
P.O. Box 670
Corona, California 91720
(714) 737-1910

For the Coachella Valley County Water District
MAURICE C. SHERRILL
General Counsel
REDWINE & SHERRILL
Suite 1020
3737 Main Street
Riverside, California 92501
(714) 684-2520

For the Imperial Irrigation District
R. L. KNOX, JR.
Chief Counsel
HORTON, KNOX, CARTER & FOOTE
Suite 101, Law Building
895 Broadway
El Centro, California 92243
(714) 352-2821

For Metropolitan Water District of Southern California
ROBERT P. WILL
General Counsel
CARL BORONKAY
Assistant General Counsel
RICHARD PAUL GERBER
Deputy General Counsel
P.O. Box 54153
Terminal Annex
Los Angeles, California 90054
(213) 626-4282

For the City of Los Angeles
BURT PINES
City Attorney
EDWARD C. FARRELL
Chief Assistant City Attorney for Water and Power
KENNETH W. DOWNEY
Assistant City Attorney
GILBERT W. LEE
Deputy City Attorney
Department of Water & Power
111 North Hope Street
P.O. Box 111
Los Angeles, California 90051
(213) 481-3296

For the City of San Diego
JOHN W. WITT
City Attorney
C. M. FITZPATRICK
Senior Chief Deputy City Attorney
202 C Street
Mail Station 3A
San Diego, California 92101
(714) 236-6220

For the County of San Diego

DONALD L. CLARK
County Counsel

JOSEPH KASE, JR.
Assistant County Counsel

LLOYD M. HARMON, JR.
Deputy County Counsel
1600 Pacific Highway,
Room 355
San Diego, California 92101
(714) 236-3991

For the State of Nevada

RICHARD BRYAN
Attorney General

BRIAN MC KAY
Deputy Attorney General
State of Nevada
Mail Room Complex
Las Vegas, Nevada 89158
(702) 384-2751

THOMAS G. NELSON
Special Counsel to State of
Nevada, Division of Colorado
River Resources

PARRY, ROBERTSON,
DALY & LARSON
P.O. Box 525
Twin Falls, Idaho 83301
(208) 733-3722

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OF NEVADA, Intervenor (hereinafter referred to collectively as the "State Parties") hereby respond to the Motion of the United States for Modification of Decree, dated December 1978.

I
Introduction.

The United States brings this motion under Articles II(D)(5) and IX of the Court's 1964 Decree, and does so on behalf of five Indian tribes, the Chemehuevi, the Colorado River, the Cocopah, the Fort Mojave, and the Quechan Tribe of the Fort Yuma Indian Reservation (hereinafter referred to collectively as "the Five Tribes"). The United States seeks to modify Article II of the Decree so as to increase the quantity of water rights allocated to each of the Five Tribes. There are two alleged bases for these increases: (1) additional water rights based on recalculation and increase in the number of irrigable acres within the boundaries of each Indian reservation as they were recognized in the 1964 Decree (so-called "Omitted Lands"); and (2) additional water rights based on post-Decree determinations that each reservation contains more area, and hence more irrigable acreage, than was recognized in the 1964 Decree (so-called "Boundary Lands"). With regard to (2), the United States claims that determinations recognizing enlarged reservation boundaries consist of Orders of the Secretary of the Interior, court judgments, and Acts of Congress,[1] all of which it claims are now final and not subject to judicial review. The United States contends, therefore, that all this Court (or an appointed Special

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[1]The United States mentions Acts of Congress (p. 1) but never specifies what they are.

Master) need do is to calculate the number of practicably irrigable acres within those established boundaries and assign additional water rights based thereon.

The State Parties disagree. As to the alleged "omitted lands," the issue of the number of practicably irrigable acres within the 1964 boundaries was fully litigated before the previous Master and finally determined by this Court in 1964, and Article IX does not authorize its reopening. As to the "boundary lands," neither the referenced Secretarial Orders nor the court judgments constitute final determinations of boundaries for purposes of establishing water rights. The State Parties do agree, however, that the underlying boundary disputes are ripe for judicial determination, that such determinations should be made by this Court, through its appointed Special Master, and that such determination can be made for the limited purpose of establishing water rights without constituting adjudications of land titles or political jurisdiction binding on any party or non-party to this lawsuit.

The State Parties contend, therefore, that this Court, through the Special Master, should only consider the boundary land claims. Such consideration should involve a two-step process: (1) determination of the underlying boundary disputes to see if any reservation has larger boundaries than were recognized in 1964; (2) if such is the case, establishment of water rights based on practicably irrigable acreage within those enlarged boundaries.

II

The Issue of Practicably Irrigable Acreage Within the 1964 Reservation Boundaries Should Not Be Relitigated.

A. Article IX of the Court's Decree Does Not Authorize Relitigation of Practicably Irrigable Acreage Within the 1964 Boundaries; That Issue Was Fully Tried by the Special Master and Finally Determined by the Court.

The issue of the amount of practicably irrigable acres within the boundaries recognized in the 1964 Decree of all five Indian reservations was fully tried by the Special Master. Substantial evidence, including expert testimony, maps, and soil surveys, was presented by the parties during the lengthy proceedings on the issue of practicably irrigable acreage within the undisputed reservation boundaries. At the time the original decision was made by the Department of Justice lawyers and their experts as to the practicably irrigable acreage, there was ample data on soils, the location of then-existing irrigation facilities, and the economic feasibility of extending those facilities. The United States' present contention that reservation lands were "omitted" from practicably irrigable acreage consideration is untenable. All the lands within the 1964 boundaries were fully considered and taken into account by the United States attorneys and their experts, and the non-practicably irrigable lands were consciously excluded from any water allocation claim because it was determined that they were not practicably irrigable; and the parties, Special Master, and the Court were all so advised in the course of the trial proceedings.[2] Thus, the lands

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[2]On January 7, 1958, the following interchange took place between David Warner (attorney heading Department of Justice legal team during the trial) and Special Master, Simon Rifkind:

in question are more properly referred to as "lands deemed non-irrigable."

The Special Master advocated a finite decree, as opposed to an open-ended decree, that would establish a water right for each of the five reservations in the amount of water necessary to irrigate all of the practicably irrigable acreage on the reservation and to satisfy related stock and domestic uses. (Special Master's Report 1960, at 263-265.) A finite determination of reservation water rights was considered necessary by the Special Master so that in time of shortage the Secretary of the Interior would know how much water to release to satisfy his delivery obligations according to priority. (Special Master's Report 1960, at 255-256.) The Special Master emphasized his concern:

> "This will preserve the full extent of the water rights created by the United States and will establish water rights of *fixed magnitude* and priority *so as to provide certainty* for both the United States and non-Indian users." (Emphasis added.) (Special Master's Report 1960, at 265.)

THE MASTER: ". . . The question is whether the maps constitute the definition of what you regard as irrigable . . ."

MR. WARNER: "Well, Your Honor, that is how we are defining 'irrigable' for the purpose of proving the claim that is being asserted."

THE MASTER: "And although there may be other irrigable lands within those reservations, those you do not lay any claim for the service of water upon?"

MR. WARNER: "That is correct."

THE MASTER: "All right. That is what we know, and that is the way we are going to be bound. This is a statement that I will take seriously." (See, Transcript before Simon H. Rifkind, Special Master, p. 14,155.)

In his same report, the Special Master recommended adoption of a Decree containing the identical Article IX which the United States now relies upon in arguing that recalculation of practicably irrigable acreage is permitted and that water rights have not been fully determined for the 1964 boundaries. (Special Master's Report 1960, at 360.) Surely the Special Master did not attach such a meaning to Article IX, nor did the Court. Referring to claims of the United States, the Court stated:

> "While the Master passed upon some of these claims, he declined to reach others, particularly those relating to tributaries. We approve his decision as to which claims required adjudication, and likewise *we approve the decree he recommended for the government claims he did decide.*" (Emphasis added.) (Opinion of the Court, 373 U.S. 546, 595.)

The Court also adopted the same Article IX, proposed by the Special Master. (Decree of the Court, 376 U.S. 341, 353.)

The State Parties contend that this Court intended Article IX to reserve jurisdiction only over matters not finally determined and that it did, in Article II of the Decree, finally adjudicate irrigable acreage within the 1964 boundaries, as recommended by the Special Master. Such adjudication is not subject to the Court's continuing jurisdiction under Article IX.

B. Public Policy Considerations Behind the Doctrines of Res Judicata and Collateral Estoppel Should Preclude Relitigation of Practicably Irrigable Acreage; Judicial Orderliness, Economy of Judicial Time, and Interests of the Litigants Should Be Preserved.

The United States' attempt to relitigate practicably irrigable acreage within the 1964 boundaries, and within the original lawsuit under Article IX, is a procedural ploy designed to avoid the doctrines of *res judicata* and collateral estoppel. These doctrines would clearly bar any such attempt made in a separate lawsuit. They should also apply here under the rule that a judgment may be final even though a party is given leave to apply to the trial court for its modification. (*Stovall v. Banks* (1870) 77 U.S. 583.)

Whether or not *res judicata* or collateral estoppel technically apply to this matter, it is clear that to permit relitigation of practicably irrigable acreage would defeat the public policy considerations behind the two doctrines. *Res judicata* provides that a final, valid judgment on the merits is conclusive on the parties and those in privity with them as to the matters adjudged, or which should have been litigated, in another action or proceeding involving the same cause of action. (See, *Felice v. U.S.* (9th Cir. 1959) 271 F.2d 782; *Miller v. National City Bank of N.Y.* (2nd Cir. 1948) 166 F.2d 723.) Such a judgment is the final judicial settlement regardless of whether all the grounds of recovery available have been put forward and even though the parties may have lacked knowledge of their complete legal rights therein. (See, *Anselmo v. Harden*

(3rd Cir. 1958) 253 F.2d 165; *McIntosh v. Wiggins* (8th Cir. 1941) 123 F.2d 316, *cert. den.* 315 U.S. 831 (1942).) The judgment is conclusive not only as to matters actually determined in the prior action, but also as to other matters which could properly have been raised and determined. It is not essential that the matter should have been formally put in issue in the former litigation; it is sufficient that the status of the action was such that the parties might have had the matter disposed of on its merits. (See, *Cromwell v. County of Sac* (1876) 94 U.S. 351; for a case pertaining to Indian claims, see *United States v. Kabinto* (9th Cir. 1972) 456 F.2d 1087, *cert. den.* (1972) 409 U.S. 842.)

The rule of collateral estoppel provides that where two actions are on different causes of action, the earlier judgment is conclusive not only as to issues actually determined in the prior action but also as to other matters which were necessary to the decision. (See *Southern Pacific R. Co. v. U.S.* (1897) 168 U.S. 1; *Sutphin v. Speik* (1940) 15 Cal.2d 195.)

The United States request that the Court recalculate practicably irrigable acreage ignores the doctrines of *res judicata* and collateral estoppel, thereby resulting in wasted effort and expense in judicial administration. If the United States' position prevails, permitting a recalculation, then the other parties to *Arizona v. California* would logically and equitably be afforded the reciprocal right to relitigate all the reservation irrigable acreage issues originally presented before the Special Master, including the question of whether "practicably irrigable acreage" should be determined as of the date each reservation was created rather than at the time of

trial. Undoubtedly, the strategy of the parties in presenting their positions before the Special Master was based, in part, on the claims then being asserted by the United States. To permit the United States at this late date to augment its claims within the conceded boundaries without permitting the parties the right to relitigate the findings on irrigable acreage would be a great inequity. The resulting wasted effort and expense in judicial administration entailed in such relitigation is one of the abuses sought to be remedied by the doctrines of *res judicata* and collateral estoppel.

In addition, any relitigation of irrigable acreage would adversely and unreasonably affect the interests of the State Parties. Taking one such example, relitigation may violate the interest of the Metropolitan Water District in the stability of definite water rights resulting from a final decree and the right not to be subjected to endless costly litigation and the continuous potential of having its water allocation reduced.

Another vivid example exists in Arizona where construction of the Central Arizona Project (CAP) is currently progressing. Plans for the CAP included water supply calculations of water available for delivery through the project. The Central Arizona Water Conservation District, created by the Arizona Legislature to contract with the Secretary of the Interior, entered into a contract with the Secretary and imposed taxes on property owners within three counties in Arizona to ensure repayment to the United States. The Arizona Water Commission has delivered to the Secretary of the Interior its recommendations for the allocations of municipal and industrial water to users requesting such water and is now considering staff recommendations for allocations of agricultural water.

All of the construction expenses, taxes, and allocations of water have been based on the expected supply which was determined by reliance on this Court's Opinion and 1964 Decree, including entitlements therein made to the Five Tribes which the United States now seeks to relitigate. The Arizona Water Commission recommended to the Secretary of the Interior that 500,000 acre-feet be allocated to municipal and industrial users. If the Tribes obtain another 93,380 acre-feet of water rights (as claimed under recalculation in Arizona), this will reduce that allocation by approximately one-fifth. It will also decrease the supply allocated to five *other* Indian tribes in Central Arizona to be delivered through the CAP.

The Special Master specifically adopted the practicably irrigable acreage test to provide certainty and stability for the State Parties and others which serve approximately 12 million people and hundreds of thousands of acres of prime farm land. The United States' characterization of the recalculation of irrigable acreage as "relatively minor adjustments" (U.S. Motion, p. 29) does not accurately indicate the potential impact of such changes on the State Parties. In the event the Court grants the requested modification and permits 114,655 acre-feet of additional diversions annually chargeable against Arizona, California, and Nevada, the increased Indian allocation to Colorado River water could reduce the allocation of those State Parties which have contracts with the United States for delivery of Colorado River water.

In conclusion, irrigable acreage within the 1964 boundaries should not be relitigated for two reasons: (1) Article IX does not authorize it; and (2) public policy considerations preclude it.

III

None of the Boundary Disputes Underlying Claims to Additional Water Rights Have Been Finally Determined.

A. The Relevance of Indian Reservation Boundaries in This Litigation.

The United States originally intervened in this action in part as trustee to assert water rights claims on behalf of all Indian reservations in the Lower Colorado River Basin. In its pleadings and at trial it asserted a "reserved" water right for each of those reservations under the *Winters* doctrine (*Winters v. United States* (1908) 207 U.S. 564) which it argued should be measured by the amount of "practicably irrigable acreage" within the boundaries of each reservation. In order to prevail, the United States, just like all the other parties, bore the burden of establishing the factual basis for the Indian claims. Consequently, it had to show that the lands for which it claimed water rights were within each reservation's legally established boundaries, much as a claimant to a riparian water right must establish that he is the owner of riparian land. When the United States presented the maps purporting to show the boundaries of each reservation, the State Parties checked those maps against the legal descriptions in the statutes and executive orders which created the reservations. Where there was no inconsistency, which was the rule, no objection was made, and the Special Master and the Court accepted the accuracy of those boundaries for the limited purpose of establishing water rights for the five reservations. Those water allocations implicitly determined the proper boundaries of the reservations for purposes of the interstate water rights controversy, but obviously such

boundary determinations were not to be binding on other land claimants not parties to the action.

Where discrepancies in the proposed boundaries were detected, as on the Fort Mojave and Colorado River reservations, California objected that no water could be allocated to the lands in the disputed areas. The Special Master felt it appropriate to resolve the disputes that were before him, primarily in order to provide the certainty for future water planning that led him to select "practicably irrigable acreage" as the measure of the Indian water rights in the first place. The Court declined to follow the Special Master's approach, as we discuss *infra*. Those two boundary disputes, plus two others, are now before the Court.

B. Orders of the Secretary of the Interior Are Not Final Determinations of Reservation Boundaries for Purposes of Establishing Water Rights.

The Secretarial Orders relied upon by the United States are functional for Department of Interior administrative purposes only, but cannot be considered final for the purpose of establishing claims for federally reserved water rights which are adverse to the interests of most, if not all, of the State Parties. The *finality* of the Secretarial Orders indicates *not* that they are immune from judicial review, but that they have reached the stage of completeness that is necessary before they can be subjected to judicial review.[3] A person suffering

[3]The Department of Interior, Office of the Solicitor, in a letter dated January 3, 1979, informed the Metropolitan Water District of Southern California that the Department of the Interior considers the Secretarial Orders to be final for its purposes. The letter states that there are no administrative procedures available to challenge Secretarial Orders and that review of such matters must take place in a judicial forum. A copy of said letter is attached, marked Exhibit A, and made a part hereof.

legal wrong because of agency action is entitled to judicial review, unless such review has been forbidden in unmistakable terms. (See, 5 U.S.C. §702; *Chicago v. United States* (1969) 396 U.S. 162; *Abbot Laboratories v. Gardner* (1967) 387 U.S. 136; *Citizens Ass'n of Georgetown, Inc. v. Zoning Com'n of D.C.* (1973) 477 F.2d 402.)

Attributing a conclusive status to the Secretarial Orders thereby rendering them immune from judicial review will deprive the State Parties of any opportunity to have their positions considered. The State Parties were not afforded the opportunity to participate in the administrative process leading to the issuance of the Secretarial Orders. This is especially inequitable since several of the boundary claims were presented before and rejected by the Special Master assigned in 1955 for the original litigation. The United States has *ex parte* enlarged the reservation boundaries of the Fort Mojave and Colorado River Reservations by Secretarial Orders on grounds the Special Master rejected. Thus, the United States has tried to achieve by Secretarial Order that which it was unable to accomplish at trial before the Special Master. The reasoning behind the United States' attempt to limit the Court's discretion to now question these Secretarial Orders is apparent; examination of the Orders in an adversary proceeding could reveal their invalidity.

The unilateral action taken by the Secretary of the Interior is almost shocking in the case of the December 20, 1978 Secretarial Order relating to the Fort Yuma Reservation. In this case, three previous Interior Solicitor opinions over a forty-one year period (Margold-1936, Weinberg-1968, Austin-1977) had found invalid the Indian claim to enlarged reservation boundaries.

The last of the three was issued only after the State Parties had urgently requested and been afforded opportunity to argue the matter before the Solicitor. Solicitor Krulitz has now summarily reversed Solicitor Austin's opinion, found the Indian claim to be valid, and the Secretary of the Interior has made an Order to that effect. The Krulitz opinion was issued without any notice or opportunity to be heard afforded to the State Parties; and the Secretarial Order was issued the same day as the opinion, followed the next day by the filing of the United States' Motion. One wonders how any Secretarial Order could ever be considered "final," even for administrative purposes within the Department, when the underlying Solicitor Opinions vary in conclusion from one occupant at that office to the next. The ultimate absurdity is the apparent contention by the United States that somehow the December 20 Secretarial Order became final, and immune from judicial review, the minute it was issued.

The State Parties recognize that administrative decisions can have a *res judicata* effect. This Court has held that *res judicata* applies when the administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which interested parties have had an adequate opportunity to litigate, both before the agency and in court. (*United States v. Utah Constr. Co.* (1966) 384 U.S. 394, 421-422; *Painters District Council, etc. v. Edgewood Contracting Co.* (5th Cir. 1969) 416 F.2d 1081, 1083-1084.) However, the fundamental assumption is that there has been a judicial process before the agency, the very thing totally lacking with the Secretarial Orders relied upon by the United States. It is obvious, therefore, why the United States has not even mentioned

res judicata as a basis for its claim of finality. Instead, the United States seems to be making a two-part argument: (1) the Secretary of the Interior has authority to resolve the reservation boundary disputes; and (2) the failure of the State Parties to challenge the Secretarial Orders has rendered them final. The State Parties emphatically disagree.

First, the Secretary of the Interior has no powers except those granted or necessarily implied from granted powers. (*Pan American Petroleum Corp. v. Pierson* (10th Cir. 1960) 284 F.2d 649, *cert. den.* (1961) 366 U.S. 936.) The United States points to no express authority, but argues that if the Secretary can survey Indian reservation boundaries, he can also resolve these disputes. However, a land survey is far different from resolving a complex boundary dispute involving questions of law as well as fact. Authority to do the latter is not implicit in the authority to do the former.

The United States contends, however, that this Court conferred such authority on the Secretary in its Opinion and Decree. However, all Article II(D)(5) of the Decree provides is that the quantities of water rights allocated to two of the Tribes shall be subject to adjustment "in the event that the boundaries of the respective reservations are finally determined . . ." The Decree says nothing about how, or by whom, the boundaries can be determined. (Decree of the Court, 376 U.S. 341, 345.)

On this matter, the Court's opinion provides:

> "We hold it is unnecessary to resolve those disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, the dispute can be settled

at that time." (Opinion of the Court, 373 U.S. 546, 601.)

This is hardly language giving the Secretary power to resolve boundary disputes. That power is in this Court and remains there. The Court only meant that it was unnecessary for it to resolve the disputes at that time, not that it was the wrong court or that this was the wrong lawsuit. At best, the language only gives the Secretary power to impliedly resolve disputes in favor of the Indians by delivering water for the disputed lands. He has no power to resolve disputes against the Indians. If he refuses to deliver them water, then "the dispute can be settled"; but there is nothing even purporting to give the Secretary power to settle such disputes. Judicial authority implies the weighing of evidence and arguments and the power to decide in favor of whichever side is more convincing. The Secretary's unilateral authority is not "judicial", and to bind the State Parties to his determination would be grossly unfair.

The second part of the United States' argument is that the State Parties' failure heretofore to challenge the Secretarial Orders has rendered them final. This contention is academic if the Secretary lacked judicial authority to determine the boundary disputes. In any event, however, the argument lacks merit.

Since there is no applicable statute of limitations, the United States is really arguing laches. Laches has two necessary elements, requiring proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. (*Costello v. United States* (1960) 365 U.S. 265, 282; *Central Council of Tlingit & Haida*

Indians, Etc. v. Chugach Native Assn. (9th Cir. 1974) 502 F.2d 1323, 1325.) The United States has not alleged that it or the Five Tribes have been prejudiced by prior failure of the State Parties to challenge the Secretarial Orders. More importantly, however, any claim of lack of diligence by the State Parties must fail.

Laches is an equitable defense controlled by equitable considerations, one of which is that the party against which it is asserted must have had knowledge of its rights and failed to exercise them. (*Halstead v. Grinnan* (1893) 152 U.S. 412, 417.) The State Parties have always considered Secretarial Orders regarding boundary disputes as functional for Department of the Interior administrative purposes only, and therefore they had no interest in challenging such Orders when first issued. This was certainly a reasonable conclusion in view of the lack of any judicial process precedent to the issuance of these Orders. Why should interested parties have the burden of either challenging or being bound to decisions regarding which they were given no opportunity to present their views?

The United States' argument has turned logic upside-down. The Secretary issues an Order on a boundary and then the United States waits, in one case, ten years before informing the State Parties that it will rely on this Order as a final boundary determination for the purpose of claiming water rights. Should the State Parties have the burden of reading the mind of the United States regarding the status it may someday attach to a Secretarial Order issued, by all appearances, merely for internal Departmental purposes? The burden should not be on the State Parties but on the United States. The United States should not only carry the

burden to prove practicably irrigable acreage but to prove the underlying reservation boundary enlargements upon which the water rights depend.

The present Motion put the State Parties on notice of the United States' intention to rely on Secretarial Orders for the purposes of establishing water rights. Even assuming the Secretary had the requisite judicial power, the diligence of the State Parties cannot be measured until the date of that Motion, December 1978. The State Parties therefore do hereby declare that most, if not all, of them desire to challenge those Orders in a judicial proceeding and do hereby request this Court, through its Special Master, to hear and rule upon those challenges so as to finally determine the boundary disputes for purposes of establishing water rights. The State Parties are entitled to and claim the right to the day in court they were never given by the Department of the Interior.

C. The Federal Court Cases Are Not Final Determinations of Reservation Boundaries for Purposes of Establishing Water Rights.

The federal court cases relied upon by the United States to "finally" determine reservation boundaries were quiet title, ejectment and trespass actions. The State Parties were not party to these actions and their rights were therefore not adjudged. It is well settled that the doctrine of *res judicata* does not operate to affect strangers to a judgment, that is, to affect the rights of those who are neither parties nor in privity with a party. (See *Sutphen Estates v. United States* (1951) 342 U.S. 19, *reh. den.* 342 U.S. 907 (1952); *Keokuk & Western R. Co. v. Missouri* (1894) 152 U.S. 301; *Dillard v. McKnight* (1949) 34 Cal.2d 209,

209 P.2d 387.) The rule denying a *res judicata* effect against a stranger has been applied regardless of the fact that the stranger knew of the prior action and might have intervened. (See *O'Hara v. Pittston Co.* (1947) 42 S.E.2d 269.)

The rule denying the right to apply the doctrine of *res judicata* as against strangers to the prior action is based upon principles of justice, fairness, and requirements of due process of law. (See *Bruszewski v. United States* (3rd Cir. 1950) 181 F.2d 419, *cert. den.* 340 U.S. 865 (1950); *Graves v. Associated Transport, Inc.* (4th Cir. 1965) 344 F.2d 894; *Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 122 P.2d 892.) The reason for the rule is based on the fact that a stranger to an action does not have the opportunity available to the parties to prove or ascertain the truth of the questions at issue. (See *Hale v. Finch* (1881) 104 U.S. 261.) The justification for the rule is well illustrated by the large number of stipulated judgments confirming Tribal title that have been entered in the post-1964 Decree federal court cases.[4] In some instances, the non-Indian litigants entered into the stipulated judgments in consideration for long-term leases of the subject land from the Tribes carrying water rights with *Winters* doctrine priority dates. In the absence of these stipulated judgments, it is unlikely that the non-Indian litigants would have had any water supply for their land. In contrast to these stipulated judgments arising out of "friendly" litigation, it is note-

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[4]Stipulated judgments were entered in the following cases: *United States v. Denham*, 73-495-ALS (U.S. D.C., 1975); *United States v. Curtis*, 72-1624-DWW (U.S. D.C., 1977); *Cocopah Tribe of Indians v. Rogers*, 70-573-PHX-WEC (1975); *United States v. Brigham Young University*, 72-3058-DWW (U.S. D.C., 1976).

worthy that in the adversary proceedings before the Special Master a majority of the boundary claims asserted by the United States were defeated.

It is well established under both Arizona and California law that a court in quiet title actions and ejectment proceedings may not adjudicate the rights of persons who are not parties to the action. (*Conway v. Mosher* (1940) 55 Ariz. 307, 101 Pac. 209; *Lake Merced Golf & Country Club v. Ocean Shore R.R. Co.* (1926) 206 Cal.App.2d 421, 23 Cal.Rptr. 881; *Hurt v. Jones* (1956) 147 Cal.App.2d 164, 304 P.2d 786; *Fogarty v. Sparks* (1963) 22 Cal. 142; *Wattson v. Dowling* (1864) 26 Cal. 124.)

The application of state law over federal common law is proper under the doctrine of *Erie R. Co. v. Tompkins* (1938) 304 U.S. 64. *Erie* requires federal courts to apply state substantive law in determining any issue or claim which has its source in state law. State law is controlling in determining all questions affecting what constitutes possession of land and generally all questions affecting real estate. (See *Barney v. Keokuk* (1876) 94 U.S. 324; *State Land Bd. v. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363; Moore's Federal Practice, §0.302[4], pp. 3015-3016.)

IV

The Reservation Boundary Disputes Are Ripe for Judicial Determination for the Limited Purpose of Resolving Water Rights Claims.

None of the reservation boundary disputes have been finally determined for purpose of establishing water rights. The State Parties contend, however, that all these disputes are ripe for judicial determination. An issue is normally ripe for judicial determination when

interests of the plaintiff are in fact subjected to or imminently threatened with substantial injury. (See *Allegheny Corp. v. Breswick & Co.* (1957) 353 U.S. 151, *reh. den.* 353 U.S. 989 (1957); *Frozen Food Express v. United States* (1956) 351 U.S. 40.) Some of the Tribes are presently using Colorado River water on the disputed areas in excess of the allocations set forth in the 1964 Decree.[5] In certain circumstances, the continued, unchallenged utilization of Colorado River water by the Tribes could give rise to claims of water rights by adverse possession or some other equitable principle. Since the Tribes have early priority dates, any increase in their water rights is adverse to those of non-Indian rights holders by pushing them down the priority ladder. This is particularly true in the case of the Coachella Valley County Water District and the Metropolitan Water District. An increase in Indian rights would reduce the amount of water available to satisfy their contractual entitlements pursuant to their lower priority rights among California water users under the Seven-Party Agreement. (Wilbur and Ely, *The Hoover Dam Documents* (1948), Appendix 1003.)

Beyond this, the State Parties believe that they as well as the Five Tribes would be best served by the certainty and predictability of water availability inherent in the most expedient resolution of all outstanding claims to Colorado River water. For examples, we again look to both the Metropolitan Water District

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[5]See Raymond S. Simpson's Motion for Leave to Intervene as Indispensable Parties by the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe, and the Quechan Tribe of the Fort Yuma Indian Reservation filed December 23, 1977 at pages 10-11 and in Brief in support of said motion at page 25.

and the State of Arizona. The ripeness of the boundary disputes is increased by Metropolitan's anticipated loss of Colorado River water. As a result of the Opinion (373 U.S. 546) and Decree (376 U.S. 340) of this Court, Metropolitan's entitlement to Colorado River water will be reduced from 1,212,000 acre-feet per year to no more than 550,000 acre-feet per year when Arizona and Nevada utilize their entitlements. Under the provisions of the Colorado River Basin Project Act, 43 U.S. Code sections 1501 *et seq.* (1968), Congress authorized the Central Arizona Project (CAP) to enable Arizona to make use of its apportionment of Colorado River water. The CAP authorization also increases the ripeness of the boundary disputes as to Arizona. The portion of Arizona's total entitlement available to the CAP will be reduced by any additional Indian water rights in Arizona. These conditions did not exist in 1964 when this Court rejected Special Master Rifkind's decision to determine the boundaries. The time is ripe to achieve a degree of certainty among Colorado River water users as to their entitlements to water.

V

This Court, Through Its Special Master, Should Determine All Boundary Disputes for the Limited Purpose of Resolving Water Rights Claims.

We have seen that none of the boundary disputes have been finally determined for the purpose of establishing water rights, and therefore these matters cannot be resolved by this Court merely finding how much

practicably irrigable acreage lies within allegedly enlarged reservation boundaries. We have also seen, however, that these boundary disputes are ripe for judicial determination and that it is in the interest of the State Parties as well as the Five Tribes to expeditiously determine all unresolved Indian tribe claims to additional water rights. The State Parties therefore believe and urge that this Court, through its Special Master, should receive evidence, hear legal arguments, and resolve each of these boundary disputes, but only for the limited purpose of potentially establishing additional water rights. Any dispute resolved so as to enlarge 1964 reservation boundaries would then lead to the second step, the determination of additional practicably irrigable acreage for the purpose of establishing water rights.

Such an approach is the only expedient way to resolve the boundary lands claims. If this Court does not undertake to resolve the boundary disputes, then such must occur piecemeal in lower courts. Years could pass before every dispute is finally determined through the appellate process; and then any dispute resolved favorably to an Indian tribe would still have to come back to this Court for a determination of practicably irrigable acreage and establishment of water rights. By contrast, this Court, through the Special Master, can now resolve all the disputes at one time, and establish water rights where appropriate.

Such an approach is not only expedient, but legally appropriate. The State Parties recognize that this is

a water rights lawsuit, not a land title adjudication, but agree with the United States that boundaries can be determined for the limited purpose of establishing water rights. When Special Master Simon Rifkind proposed to determine the Colorado River Indian Reservation boundary in 1960, the California Defendants expressed their concern:

> "It is . . . definitely of the first magnitude if it is in any way to be a binding adjudication of land titles or political jurisdiction. Indeed, it is a major lawsuit in itself, involving substantial private and sovereign interests." (Opening Brief of the California Defendants in Support of their Exceptions to the Report of the Special Master, May 22, 1961, p. 279.)

They were concerned that private individuals, not parties to the lawsuit, would have their land title claims adjudicated and that the determination regarding riparian lands along the mainstream of the Colorado River would affect the boundary between the States of Arizona and California. The California Defendants therefore proposed a disclaimer in the event the Court decided to determine the boundary as the Special Master recommended. That disclaimer would have provided that such a determination would not affect:

> "Any right, claim, or interest in land, or jurisdiction with respect to land, by any person, natural, corporate, or political, whether or not a party to this case." (Opening Brief of the California Defendants, *supra*, at 280.)

This Court declined to make the determination recommended by the Special Master, so the disclaimer was

unnecessary. (Opinion of the Court, 373 U.S. 546, 601.)

The State Parties today have the same concern as the California Defendants in 1961. We believe that this Court should now determine all the reservation boundaries but should only do so with the above disclaimer.[6]

It is not entirely clear whether this Court declined to determine boundary disputes in its 1963 Opinion because the disputes were not then ripe for adjudication or because this was not the appropriate lawsuit or court in which to make such determination. The State Parties are convinced, however, that this is precisely the proper lawsuit and court in which the boundary disputes underlying water rights claims central to this case must be resolved. So long as boundary determinations are made for the limited purpose of resolving water rights claims, nothing could be more germane or appropriate to this very lawsuit.

Conclusion.

This Court, through its Special Master, should not recalculate practicably irrigable acreage within the 1964 reservation boundaries. The Court should, however, resolve all reservation boundary disputes for the limited purpose of determining whether any of the Five Tribes

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[6]If this Court should elect to determine boundaries but refuse to adopt this disclaimer, then it would be necessary to join as parties all persons with land title claims in the disputed areas and to allow all such persons and political entities to fully present their positions.

are entitled to additional water rights, and if so, in what quantity. Those disputes have not heretofore been resolved but are now ripe for adjudication. It is in the interest of the State Parties as well as the Five Tribes for this Court, through its Special Master, to settle these questions.

Respectfully submitted,

State of California,
GEORGE DEUKMEJIAN,
Attorney General,

SANFORD N. GRUSKIN,
Chief Assistant Attorney General,

R. H. CONNETT,
N. GREGORY TAYLOR,
Assistant Attorneys General,

DOUGLAS B. NOBLE,
EMIL STIPANOVICH, JR.,
ANITA E. RUUD,
Deputy Attorneys General,

By DOUGLAS B. NOBLE,

State of Arizona,
RALPH E. HUNSAKER,
Chief Counsel,
Arizona Water Commission,

Palo Verde Irrigation District,
ROY H. MANN,
Counsel,

CLAYSON, ROTHROCK & MANN,

Coachella Valley County Water District,
MAURICE C. SHERRILL,
General Counsel,
REDWINE & SHERRILL,

Imperial Irrigation District,
R. L. KNOX, JR.,
Chief Counsel,
HORTON, KNOX, CARTER & FOOTE,

The Metropolitan Water District of Southern California,
ROBERT P. WILL,
General Counsel,
CARL BORONKAY,
Assistant General Counsel,
RICHARD PAUL GERBER,
Deputy General Counsel,

City of Los Angeles,
BURT PINES,
City Attorney,
EDWARD C. FARRELL,
Chief Assistant City Attorney, for Water and Power,
KENNETH W. DOWNEY,
Assistant City Attorney,
GILBERT W. LEE,
Deputy City Attorney,

City of San Diego,
JOHN W. WITT,
City Attorney,
C. M. FITZPATRICK,
Senior Chief Deputy City Attorney,

County of San Diego,
DONALD L. CLARK,
County Counsel,
JOSEPH KASE, JR.,
Assistant County Counsel,
LLOYD M. HARMON, JR.,
Deputy County Counsel,

State of Nevada,
RICHARD BRYAN,
Attorney General,
BRIAN MCKAY,
Deputy Attorney General,

By DOUGLAS B. NOBLE.

EXHIBIT A.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

Mr. Robert P. Will
General Counsel
The Metropolitan Water District
of Southern California
Box 54153
Los Angeles, CA 90054

JAN 3 1979

Dear Mr. Will:

Secretary Andrus has asked me to respond to your letter of December 11, 1978, concerning the resolution of Indian boundary disputes for reservations along the Lower Colorado River. In December 1978, the Solicitor General of the United States filed a petition in the Supreme Court in which additional water is sought for each of the five reservations. The petition, a copy of which is enclosed, sets forth with specificity the position of the United States with respect to each of the boundary determinations and the legal effect of the various determinations made by this Department.

None of the five tribes have made application for further boundary changes so far as I am aware. Our office does not plan to recommend the initiation of any district court litigation to adjudicate reservation boundaries. For our purposes, we consider the administrative determinations to be final.

You asked us to advise you as to any administrative procedures available to challenge this Department's administrative determinations in settling the reservation boundary questions. While decisions of subordinate officials are subject to an elaborate review procedure within the Department, there are no comparable procedures available for the review of Secretarial decisions. Review of such matters must take place in a judicial forum.

In the event this letter and the enclosure does not fully answer your questions, please feel free to contact Mr. Dan Rosenfelt of my staff who will be pleased to provide you with such additional information as you may need. Mr. Rosenfelt can be reached at (202) 343-6967.

Sincerely,

Frederick N. Ferguson

DEPUTY SOLICITOR

Enclosure